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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Fifth District

BRIEF

For National Farm & Power Equipment Dealer's Association as *Amicus Curiae*

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TABLE OF CONTENTS

	Page
Interest of the *Amicus Curiae*	1
Argument	3
I. Traditional Commercial Practice and Fairness Require That the "First in Time Rule" Be Rejected	3
II. Adopting the "First in Time Rule" Is Commercially Impractical and Would Impose Unnecessary Hardships on Farmers and Equipment Dealers	7
III. The First in Time and Choateness Rules Are Not the Will of Congress, and, Until Congress Acts, the Fifth Circuit's Rule, Based Upon the Model U.C.C., Provides a Greater Degree of National Uniformity and Consistency With Public Policy	8
IV. Alternatively, This Court Should Utilize a Federal Rule Incorporating State Law to Determine Lien Priorities Because the FmHA Already Operates as a Commercial Lender at the State and County Levels and Is Governed by State Law in Many of Its Activities	13
Conclusion	17

Citations

Cases:

Citizens Co-op Gin v. United States, 427 F.2d 692 (5th Cir. 1970)	4
Connecticut Mutual Life Insurance Co. v. Carter, 446 F.2d 136 (5th Cir.), cert. denied, 404 U.S. 857 (1971)	10

International Union v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 16, 17

State Securities Co. v. Aviation Enterprises, Inc., 355 F.2d 229 (10th Cir. 1966) 9

United States v. Sommerville, 211 F. Supp 848 (W.D. Pa. 1962), aff'd on other grounds, 324 F.2d 712 (3rd Cir. 1963) 9-10

Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852 (1970) 17

Statutes and Regulations:

Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1921 et seq. 17

Consolidated Farm and Rural Development Act:

7 U.S.C. 1921 9

7 U.S.C. 1932 2

Federal Tax Lien Act of 1966:

26 U.S.C. 6323 ..... 4, 9

26 U.S.C. 6323 (b)(5) 4, 10

Labor Management Relations Act of 1947, 29 U.S.C. 185 16

Securities Exchange Act of 1934:

15 U.S.C. 78j 17

Model U.C.C. (1972 ed):

9-302(1)(c) 11

9-310 ..... 4, 10

9-312(4) 11

7 CFR 1800.3 14

7 CFR 1800.4 14

7 CFR 1921.105 14

7 CFR 1921.105(a) 14

7 CFR 1921.105(d)(2)(ii)(B) 14

7 CFR 1921.105(g) 14

7 CFR 1921.106 ..... 7, 11, 12

7 CFR 1921.106(c) 14

7 CFR 1921.107(a)(4) 15

7 CFR 1921.107(b)(2) 15

7 CFR 1921.108 15

7 CFR 1921.111(b) 11, 12

7 CFR 1921.111(c) 15

7 CFR 1930.27(d) 15

7 CFR 1930.44 15

7 CFR 1930.44(a)(3) 6

7 CFR 1930.44(b)(2) 6

7 CFR 1930.46(d)(1) 15

7 CFR 1930.46(d)(3) 15

7 CFR 1930.47(b)(3) 15

Miscellaneous:

Agricultural Outlook (U.S. Dept. of Agriculture August 1978) 5

1977-78 United States Manual 14

White & Summers, *Uniform Commercial Code* (1972) ..9, 10

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BRIEF

For National Farm & Power Equipment Dealer's Association as *Amicus Curiae*

INTEREST OF THE *AMICUS CURIAE*

The National Farm & Power Equipment Dealers' Association (the "Association"), *amicus curiae* in this case,[1] is a Mis-

[1] This brief is filed pursuant to written consent of both parties to the case, in accordance with Rule 42 of the Court.

souri nonprofit corporation consisting of 31 affiliated state and regional associations of retail farm, industrial and power equipment dealers. The 31 affiliated associations represent 10,325 dealers in the 48 contiguous states. The Association is a national trade and service organization for the affiliated associations and their dealer members charged with advancing the general welfare of dealers and having a duty to ". . . aid and protect its members collectively in any and all of their proper business relations."[2]

The Association's member dealers are the principal means of selling and servicing farm equipment throughout the United States. In connection with such sales, the dealers also frequently provide or arrange financing for purchasers. Consequently, the Association's member dealers have frequent business dealings with farmers and ranchers who have Farmers Home Administration ("FmHA") loans. The interests of the Association's member dealers would be significantly and adversely affected if this Court reverses the Fifth Circuit and holds that a security interest of the FmHA is superior to the mechanic's lien of a farm equipment dealer. Because the FmHA is also authorized to make and insure business loans in rural communities,[3] the impact of this case is not limited to the agricultural sector. Thus, the Association's industrial equipment dealers are also vitally concerned about the outcome of this case insofar as it affects the relative priority of liens where the FmHA has made or guaranteed business and industrial loans.

If this Court were to reverse the Fifth Circuit and hold that a security interest of the FmHA is superior in all instances to the mechanic's lien of a dealer for repairs to equipment, traditional commercial practices would be disrupted, and dealers and

[2] Excerpt from the Association's By-Laws.

[3] Consolidated Farm and Rural Development Act, § 310B (7 U.S.C. 1932).

their customers throughout the country would suffer the consequences. Dealers would have to consider whether customers requesting equipment repairs were borrowers from the FmHA, and, if they were, whether payment in advance or other security devices should be required before repair work could be commenced. All of this would result in delaying needed equipment repairs and would probably increase the cost of doing business. Moreover, such delays would be especially severe in agricultural operations because broken equipment must be repaired as soon as possible to meet planting, cultivation and harvesting requirements.

ARGUMENT

I. Traditional Commercial Practice and Fairness Require That the "First In Time Rule" Be Rejected

The government's attempted assertion of the first in time rule goes completely contrary to the special status afforded repairmen and materials suppliers under the lien laws in force in one form or another in virtually every state. The purpose of such laws is stated in the official comments to the Uniform Commercial Code:

> . . . to provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

U.C.C., §9-310, Comment 1.

This special status of the repairmen's lien has been recognized in the Tax Lien Act, 26 U.S.C. 6323, and the court of appeals correctly concluded that that statute established rules to be followed in non-tax cases. In construing §6323(b)(5) of the Tax Lien Act in *Citizens Co-op Gin v. United States*, 427 F.2d 692 (5th Cir. 1970), the Fifth Circuit stated the policy behind favoring the repairman in this manner:

> The statute was designed to protect the small businessman who operates informally, depending upon an oral agreement and his possession to enforce his claim for a reasonable fee for services which rendered the property more valuable . . . The person involved, because of the informality of the transaction and well established custom, is unlikely to check the tax notices or obtain a written security agreement, but he does by custom retain control of the property until he is paid. When such a transaction —whether it be the repair of an automobile or the harvesting and ginning of cotton—increases the value of the property, we think Congress intended that the workers' security be protected against the federal tax lien. To hold otherwise would create injustice and hardship, a result contrary to the remedial purposes of the statute.

Id. at 698.

The collection of taxes is certainly more vital to the government's existence than the making of farm loans through the FmHA. Accordingly, if, as Congress has determined, a repairman's lien takes priority over a federal tax lien, *a fortiori* a repairman's lien should take priority over a lien of FmHA.

There simply is no justification for the government to enjoy any special status when it enters the commercial lending field.[4] Simply stated, the government's position is that its interest in collateral securing its loans is automatically superior to the in-

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[4] The government suggests in its brief (p. 10) that it is not just another commercial lender. However, as shown by the table set forth below taken from *Agricultural Outlook*, p. 17 (U.S. Dept. of Agriculture August 1978), in March 1978 FmHA as a leader accounted for $4.2 billion of the $43.1 billion of all nonreal estate farm loans outstanding. A lender of such magnitude cannot be insulated from traditional commercial practices without severe economic consequences.

NONREAL ESTATE FARM LOANS OUTSTANDING

	Jan-Mar 1977	Jan-Mar 1978
	Bil. Dol.	
Banks		
Beginning	$23.3	$25.7
Ending	23.7	25.5
Percent change	2%	1%
Production Credit Associations		
Beginning	12.2	13.5
Ending	12.6	13.4
Percent change	3%	0

[Footnote Continued on Next Page]

terest of all third parties merely because it is the government. Such an argument cannot stand.

Ironically, we note that in advocating a blanket, dragnet lien based on the first in time rule, the government, in an apparent case of excessive zeal, goes beyond what is contemplated in FmHA's regulations with respect to mechanic's liens.[5] FmHA's own regulations contemplate the existence of other liens, including mechanic's liens, which may under various state laws, conflict with the FmHA's lien in priority. 7 C.F.R. 1930.44(a)(3) states:

> (3) *Chattel mortgages and other liens of private parties.* A State supplement, if considered necessary by the State Director and OGC [Office of General Counsel], will list priorities of chattel mortgages, landlord's liens, mechanics and materialmen liens, and other liens of private parties.

7 C.F.R. 1930.44(b)(2) speaks of "liens which are prior to FmHA liens."

Moreover, upholding the government's contention that FmHA has a lien superior to all others would raise serious ques-

Farmers Home Administration		
Beginning	1.9	3.1
Ending	2.2	4.2
Percent change	16%	35%
Total		
Beginning	37.3	[1]42.3
Ending	38.4	43.1
Percent change	3%	2%

[1] Total nonreal estate farm loans on January 1, 1978 are estimated at $55.5 billion including—in addition to the above—loans of individuals and others ($8.3 billion), Commodity Credit Corporation loans ($4.5 billion), and a miscellaneous group ($0.4 billion).

[5] See Point IV, *infra*, for further discussion of the inconsistencies between the government's argument and FmHA's regulations.

tions about the validity of purchase money security interests through which large amounts of farm equipment are financed. FmHA's regulations now specifically state that purchase money security interests, if properly perfected, take priority over other liens. 7 C.F.R. 1921.106. If the first in time rule were to be adopted, the priority of purchase money security interests would be drawn into question, and the financing of farm equipment would become much more difficult—all to the great detriment of both farmers and equipment dealers.

The rule stated by the Fifth Circuit is in accordance with traditional commercial practice and adequately protects the interests of the government. The government's argument for the first in time rule is not only unfair to third parties with a claim to collateral, it would give FmHA greater protection than contemplated by FmHA in its own regulations regarding priority of liens.

II. Adopting the "First In Time Rule" Is Commercially Impractical and Would Impose Unnecessary Hardships on Farmers and Equipment Dealers

The government contends that adopting the first in time rule in the context of this case would still permit a repairman to protect himself. In its brief (p. 10), the government suggests that a repairman could protect himself by conducting a lien search to determine the existence of other lien holders, request payment in advance, demand other security, and request a waiver of the FmHA's prior lien.

Such suggestions ignore the realities of the business world. If a farmer's piece of equipment breaks down during harvest, he needs it repaired as rapidly as possible. Only after the work is completed would the repairman discover the farmer is unable to pay and assert the lien. Repairmen are simply not in the business of lending money and cannot be expected to follow the

same procedures as commercial lenders. A repairman cannot reasonably be expected to perform a lien search before commencing repair work. Because the cost of repairs is normally not known until after the work is completed, requiring payment in advance is also impractical. Requiring additional security is no solution because the farmer's other property is probably already subject to prior liens. Requesting a waiver of the FmHA's prior lien is likely to involve inordinate delays, and obtaining such waivers is by no means certain.

When it is considered that most repair bills are insignificant when compared to the amounts loaned by FmHA,[6] the procedures which the government suggests repairmen follow appear all the more absurd. Imposing the first in time rule, as urged by the government, will only make it more difficult for farmers with FmHA loans to obtain equipment repairs. Indeed, the result could be discrimination by repairmen against farmers with FmHA loans. In addition, delays resulting from having to make arrangements to finance equipment repairs at crucial times such as planting and harvesting could cause a farmer to suffer reduced yields or loss of his crop.

If the purpose of the FmHA is to aid farmers, this purpose will be substantially subverted by adoption of the government's first in time rule.

III. The First in Time and Choateness Rules Are Not the Will of Congress, and, Until Congress Acts, the Fifth Circuit's Rule, Based Upon the Model U.C.C., Provides a Greater Degree of National Uniformity and Consistency With Public Policy.

This Court must, for the first time, decide whether, and to what extent, a possessory repairman's lien has priority over an

[6] The amount of the repair bill at stake in this case was $543.81, and the principal amount of the outstanding FmHA loan was $23,500.

earlier perfected federal security interest. The federal statute governing the subject loan is the Consolidated Farm and Rural Development Act, Sec. 301 *et seq.*, 7 U.S.C. 1921 *et seq.*, but the statute is silent as to the priority issue presented in this case. Thus the first in time rule advanced by the government has no statutory basis and is merely one of several alternatives considered by the Fifth Circuit.

In formulating a rule based upon Article Nine of the Uniform Commercial Code, the Fifth Circuit has chosen the alternative which best effectuates the will of Congress, as evidenced by the Tax Lien Act, 26 U.S.C. 6323, and the policy of the vast majority of states which have enacted the U.C.C. The Fifth Circuit has properly rejected the judge made rule of first in time. The choice between the archaic first in time rule and the U.C.C. rule is articulated in White & Summers, *Uniform Commercial Code* §22-11 (1972), as follows:

> The U.S. Congress has enacted a variety of statutes in the security field, but except for federal tax lien statutes nearly all of them are skeletal in nature, and typically leave open such matters as requirements for creation of the interest, priorities, and default rights. If the federal statute is silent, what law should a court use to fill the gap? A court must choose either (1) to accept the invitation of the Code drafters in 9-104(a) to flesh out a federal statutory skeleton with Article Nine law, or (2) to flesh it out with common law entirely of the court's own making. So far, most courts are taking the first course either on the theory that Congress had no power to or did not intend to pre-empt the entire field, or on the theory that while the presence of the statute evinces an intent to pre-empt the entire field, the courts may properly look to Article Nine "by analogy" for the relevant governing rule. (Footnotes omitted.)

See generally *State Securities Co. v. Aviation Enterprises, Inc.*, 355 F.2d 225, 229 (10th Cir. 1966); *United States v. Sommer-*

ville, 211 F.Supp. 843, 846-847 (W.D. Pa. 1962), *aff'd on other grounds*, 324 F.2d 712 (3rd Cir. 1963).

The first in time rule which the government would have this Court adopt is directly contrary to Model U.C.C. §9-310, which gives the possessory lien of a repairman priority over an earlier security interest if the repairman's lien is recognized by statute or rule of law. Such a refusal to apply the U.C.C. by analogy has been criticized:

> But a few courts, state as well as federal, have indicated a disposition to make up some federal common law of their own on the theory that federal law "preempts the field." Of course, even if federal law pre-empts the field, a court could still resort to Article Nine by analogy. *The contrary assumption is simply fallacious.*

White & Summers, *Uniform Commercial Code* §22-11 (1972). (Footnote omitted) (emphasis added).

The better approach, in the absence of the direct mandate of Congress under the Consolidated Farm and Rural Development Act, is to fashion a rule based upon Article Nine to the greatest extent possible.

Not only does the first in time rule ignore the U.C.C., it also disregards the nearest expression of Congressional intent in the area of relative lien priority. As the Fifth Circuit correctly points out, Crittenden's lien would have priority over an earlier federal tax lien under the Tax Lien Act, 26 U.S.C. 6323(b)(5), which abrogates the choateness and first in time doctrines with respect to federal taxes. The Tax Lien Act had already been applied by analogy to FmHA loans in *Connecticut Mutual Life Insurance Co. v. Carter*, 446 F.2d 136 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971). The policy reasons stated by the Fifth Circuit in *Connecticut Mutual* are compelling:

> The collection of taxes is certainly more vital to the government's existence than the making of farm loans and if Congress determines (as it has) that a federal tax lien, involuntarily imposed upon the government, is not unduly threatened by an inchoate lien for attorneys' fees, then we see no reason to exempt a federal mortgage lien, which the government sought to obtain, from the operation of a provision for attorneys' fees in a first mortgage.

Id. at 139.

While the government's sole argument in this case is based upon the sanctity of the choateness and first in time doctrines and the alleged need for their universal application, the FmHA's own regulations deviate from these venerable doctrines in connection with purchase money security interests:

> A purchase money security interest in security property will take priority over an earlier perfected security interest. . . .

7 C.F.R. 1921.106.

> . . . FmHA after-acquired security interests take priority over other security interests perfected after the FmHA financing statement was filed, except as stated in §1921. 106.

7 C.F.R 1921.111(b). These regulations clearly reflect U.C.C. §§9-312(4) and 9-302(1)(c).

Thus, under FmHA's own regulations, if Crittenden had sold equipment to Bridges and had perfected his security interest under state law, Crittenden would have had priority over an earlier perfected FmHA loan. Yet the government argues in this case that Crittenden's possessory repairmen's lien, perfected under state law, is inferior to the FmHA loan on account of the choateness and first in time doctrines. Thus it is apparent the Department of Justice and FmHA positions are

inconsistent, as the regulations recognize the demise of the inchoateness and first in time doctrines. Because the government regulations are based upon the Model U.C.C., the only *uniform* approach is to determine relative lien priority in accordance with the Model U.C.C.

In its brief in *Kimbell Foods*, at pages 21-25 and 41-44 (adopted by reference at page 18 of the government's brief in this case), the government insists it should not be treated as any other commercial lender. However, the government ignores the fact its own regulations place it in the same position as other commercial lenders, at least with respect to purchase money security interests. 7 C.F.R. 1921.106 and 1921.111 (b). The government also seems to forget that the principle of *uniformity* requires it be treated in the same manner as commercial lenders.

The government at page 10 of its brief criticizes the model U.C.C. rule as inequitable because possessory repairmen's liens would have priority over FmHA loans, whereas unsecured creditors, such as grocers, would continue to be behind FmHA loans. The substance of this incredible contention is that the only equitable solution is to make all liens, whether secured or unsecured, perfected or unperfected, inferior to government liens in all cases.

Until such time as Congress establishes definite priorities with respect to FmHA loans, the Model U.C.C. approach, adopted by the Fifth Circuit, best effectuates public policy and national uniformity. The archaic doctrines of choateness and first in time are no longer consistently followed by the government, nor should they be.

IV. Alternatively, This Court Should Utilize a Federal Rule Incorporating State Law to Determine Lien Priorities Because the FmHA Already Operates as a Commercial Lender at the State and County Levels and Is Governed by State Law in Many of Its Activities.

If this Court should choose not to follow the Fifth Circuit's rule based on UCC principles to determine this controversy, it should nevertheless adopt a rule incorporating state law rather than the judge made first in time rule. The government would not be prejudiced by such a resolution because the FmHA is already governed by state law in many areas. This solution calls for a federal common law rule which would adopt or incorporate by reference the applicable state law. The Fifth Circuit stated:

> . . . a decision by this court to incorporate state law would not mean that federal courts must blindly follow a state law which was designed to prejudice federal interests or which produced results consistently antagonistic to those interests. Federal jurisdiction and the fact that state law would apply only by virtue of incorporation into federal law would prevent such a result.

(Pet. App. 27a, n. 18). Thus the federal courts would be able to screen out any unreasonable state legislation.

The financing statement filed by the FmHA in this case utilizes a standard FmHA form. The form lists the owner of real estate in which a security interest is given, and a footnote specifies that "owner" means "Record owner *if required by State law*, otherwise reputed owner." (A. 11-12) (emphasis added). If the FmHA is already governed by state law in determining the identity of the record owner of the property, then it would be inconsistent to exempt the FmHA lien from state law with respect to its priority.

FmHA loans are administered by State Offices, with State Advisory Committees which "serve in an advisory capacity to

the State Directors on all phases of the Farmer's Home Administration." 7 CFR 1800.3. The state organizations are further broken down into 1750 County Offices which determine eligibility for and the amounts of loans. *1977/78 United States Government Manual*, p. 111; 7 CFR 1800.4. Thus, the FmHA has a strong presence on the state and local levels as a commercial lender.

The FmHA regulations recognize FmHA's involvement with state law. Examples of such recognition are:

1. Financing statements and security agreements are required in UCC states, while chattel mortgages and crop pledges are required in Louisiana. 7 CFR 1921.105.

2. With respect to security instruments to be executed by partnerships, the FmHA should seek "the advice of the Regional Attorney or Attorney in Charge, as necessary, to close the loan and obtain the desired liens and liability." 7 CFR 1921.105(a).

3. Subsequent loans having crops as security are affected by the state where the collateral is located: "When determined necessary by OGC [Office of General Counsel], a State supplement will be issued to further explain how often a security agreement covering crops will be taken." 7 CFR 1921.105(d) (2) (ii) (B).

4. Where collateral is located in a state other than that of a borrower's residence, the County Office in the other state must be consulted about "the security instruments to be used and the places of filing or recording in the other State." 7 CFR 1921.105(g).

5. With respect to purchase money security interests in inventory, the office of General Counsel may issue state supplements "to further explain the requirements for perfecting" such a security interest. 7 CFR 1921.106(c).

6. The majority age of youths is defined in "state supplements." 7 CFR 1921.107(a)(4).

7. The minimum requirements for lien searches are set by State Directors and may vary from state to state. 7 CFR 1921.107(b)(2).

8. State statutes, as well as certain forms, such as mortgages, which are commonly used in a particular state, are to be taken into consideration in obtaining subordination agreements, et cetera. 7 CFR 1921.108.

9. "State supplements" are to be issued concerning future advance and after-acquired property clauses. "A State supplement will also be issued when considered necessary by OGC *to reflect any State statutory changes in its version of the UCC.*" 7 CFR 1921.111(c). (Emphasis added).

10. State law determines whether the FmHA must record or file satisfactions of chattel mortgages. 7 CFR 1930.27(d).

11. With respect to the distribution of liquidation sale proceeds, priorities of chattel mortgages, other liens of private parties (including mechanics liens) and UCC liens are determined according to state law. 7 CFR 1930.44.

12. The status of many noncontractual liens as secured or unsecured is determined by state law in connection with the priority of secured claims against the estate of a deceased borrower. 7 CFR 1930.46(d)(1) and (3).

13. State homestead and other exemptions are taken into consideration with respect to FmHA security involved in a bankruptcy. 7 CFR 1930.47(b)(3).

Thus, as a practical matter, the FmHA is already heavily involved in state law. Because FmHA is already subject to state law

in perfecting and enforcing security interests by virtue of its own regulations, the government argument for a standardized federal law is in clear conflict with FmHA's published regulations. Just as the FmHA regulations incorporate state law by reference, so also should the federal rule governing lien priorities.

In many instances where federal statutes are silent as to a given point, the courts have turned to the appropriate state law to supply the missing details. In *International Union v. Hoosier Cardinal Corp.*, 383 US 696 (1966), this Court considered § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, which was silent as to the applicable statute of limitations. The labor union argued that the state statute could not apply because the dispute was governed by federal law, and urged the Court "to devise a uniform time limitation to close the statutory gap left by Congress." *Id.* at 701. Rejecting this plea for uniformity, this Court stated:

> The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.

Id. at 702-703. (Footnote omitted). Therefore the Court adopted, as a matter of federal law, the appropriate state statute of limitations.

The controlling purpose of Congress in enacting the Consolidated Farmers Home Administration Act of 1961 is "to provide for more effective credit services to farmers." 7 U.S.C. 1921. The need to decide the relative priority of a repairman's lien and a FmHA loan is unlikely to arise unless the farmer defaults on his government loan, as in the present lawsuit. The federal law is designed to assist the farmer by extending credit to him, and not to give the government an unfair advantage in priority disputes with repairmen after the farmer has gone out of business. As in *International Union, supra*, the lack of uniformity in dealing with the assets of a bankrupt farmer is unlikely to frustrate the federal act in any way.

On the contrary, adoption of the rule advanced by the government, giving the FmHA automatic priority over repairmen, would tend to frustrate the purposes of the act by making it more difficult for farmers to obtain necessary repairs for their farm equipment.

The courts have also adopted state statutes of limitations in connection with § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j, stating that, in the absence of federal law, there should be applied that state law which best effectuates federal policy. See, e.g., *Vanderboom v. Sexton*, 422 F.2d 1233, 1237 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

Accordingly, even if this Court does not follow the UCC rule, it should adopt a federal rule incorporating the applicable state law on relative lien priorities. Such a rule is consistent with the Congressional intent expressed in the Consolidated Farmers Home Administration Act and recognizes the FmHA's true position as a large commercial lender at the state and local levels, already heavily involved in state law in many of its activities.

CONCLUSION

The basic issue in this case is whether FmHA should receive favored treatment in the priority of liens when it voluntarily enters the private financial markets as a substantial lender.

The answer should be a resounding no. Basic fairness dictates that FmHA be subject to the same rules as other lienholders under such circumstances. Indeed, FmHA has recognized this in its own regulations which require that it comply with local law in obtaining and enforcing security interests. The government, however, has taken a position inconsistent with FmHA by advancing its choateness and first in time arguments.

To uphold the government's position would have an adverse impact on the advancement of credit to FmHA borrowers by those supplying goods and services to them. This would be clearly contrary to the remedial purposes of FmHA as expressed by Congress.

The Fifth Circuit has fashioned a rule which adequately protects FmHA's interests based on sound commercial practice and the Uniform Commercial Code. The Fifth Circuit decision should be affirmed; or, alternatively, this Court should decree that FmHA be subject to the same local law provisions as a private lender, as, in fact, FmHA's own regulations presently require.

Respectfully submitted,

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December 1978

Certificate of Service

The undersigned hereby certifies that the foregoing Brief was served by mailing, air mail, postage prepaid, three copies to each of:

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on this 20th day of December, 1978.

. . . . . .